In the
Supreme Court of the United States

OCTOBER TERM, 1971

No.

JAMES B. BRADLEY, JR.,
BYRON H. JOHNSON,
ROBERT T. ODELL, JR., and
WILLIAM JAMES HELLIESEN,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners James B. Bradley, Jr., Byron H. Johnson, Robert T. Odell, Jr., and William James Helliesen pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on March 10, 1972.

Citations to Opinion Below

The opinion of the Court of Appeals is not yet reported. A copy of the opinion is attached hereto as Appendix A.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on March 10, 1972.[1] The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

Petitioners were convicted on May 6, 1971 of conspiracy, prior to May 1, 1971, to violate 26 U.S.C. §§ 4705 (a) and 7237(b), five days following the effective date of repeal (by §1101(b)(4)(A) of Pub. L. 91-513, 84 Stat. 1236) of 26 U.S.C. §7237(d), prohibiting suspension of sentence, grant of probation, or grant of parole to violators of 26 U.S.C. §4705(a). The questions presented are:

1. Whether the sentencing alternatives of suspension of sentence and probation otherwise available to the trial judge under 18 U.S.C. §3651 were made unavailable by §1103(a) of Pub. L. 91-513, 84 Stat. 1236 or by 1 U.S.C. §109.

2. Whether the judgments of convictions of conspiracy to violate 26 U.S.C. §§ 4705(a) and 7237(b) preclude application of 18 U.S.C. §4202 to grant petitioners release on parole during their confinement, if any.

Statutory Provisions Involved

26 U.S.C. §4705(a), 68A Stat. 551.

> It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pur-

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[1] On January 27, 1972, the Court of Appeals affirmed the judgments of conviction. *United States* v. *Bradley, et ali*, —— F.2d ——, (1 Cir., 1972), Dkt. Nos. 71-1186, 71-1187, 71-1188, 71-1189. The question of the sentences was not dealt with. In the instant case, the Court of Appeals "reach[ed] the merits of defendants' motions [for vacation of sentences] by considering it as an append-

suance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate. (repealed, effective May 1, 1971. §§1101(b)(3)(A), Pub. L. 91-513, 84 Stat. 1292; §1105(a), Pub. L. 91-513)

26 U.S.C. §7237, 70 Stat. 568.

(b) Whoever . . . conspires to commit an offense, described in section 4705(a) . . . shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000 . . . .

. . . . . .

(d) Upon conviction — . . .

(2) of any offense the penalty for which is provided in subsection (b) of this section . . .

the imposition or execution of sentence shall not be suspended, probation shall not be granted and in the case of a violation of a law relating to narcotic drugs, section 4202 of title 18, United States Code, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 24-201 and following), as amended, shall not apply. (repealed, effective May 1, 1971, §1101(b)(4)(A), Pub. L. 91-513, 84 Stat. 1292, §1105(a), Pub. L. 91-513)

Pub. L. 91-513, 84 Stat. 1236 *et seq.*

§1101, 84 Stat. 1292.

(b)(3)(A) Subchapter A of chapter 39 of the Internal Revenue Code of 1954 (relating to narcotic drugs and marihuana) is repealed.

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age to their appeal." *United States* v. *Bradley, et ali*, —— F.2d ——, ——, (1 Cir., 1972), dec. 3/10/72, Dkt. Nos. 71-1186, 71-1187, 71-1188, 71-1189, Slip Op. at 2. A copy of this opinion is appended hereto as Appendix B.

(b)(4)(A) Section [ ] 7237 (relating to violation of laws relating to narcotic drugs and marihuana) . . . of the Internal Revenue Code of 1954 are [is] repealed.

. . . . . .

§1103(a)

Prosecutions for any violation of law occurring prior to the effective date of section 1101 shall not be affected by the repeals or amendments made by such section . . . , or abated by reason thereof.

§1105(a)

Except as otherwise provided in this section, this title shall become effective on the first day of the seventh calendar month that begins after the day immediately preceding the date of enactment.

1 U.S.C. §109, 61 Stat. 633

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability. . . . .

Statement of the Case

Review is sought of the Order dated March 10, 1972 of the United States Court of Appeals for the First Circuit (appended hereto as Appendix A-1) denying petitioners' motions for order vacating sentences and for remand and for stay of mandate pending resentencing in accordance with the court's opinion of the same date, (Appendix A)

which in turn affirmed the sentences as "legally imposed". Petitioners had been sentenced to five years imprisonment each following a jury finding of guilty as to each defendant of conspiracy to violate 26 U.S.C. § 4705(a) by selling cocaine not in pursuance of a written order form, in violation of 26 U.S.C. §7237(b). Petitioners Bradley and Johnson were also charged with substantive violations of 26 U.S.C. §4705(a) and acquitted and all petitioners other than Johnson were found guilty of violation of 18 U.S.C. §924(c)(2). The latter convictions, upon which each petitioner so convicted was sentenced to a suspended sentence of one year's imprisonment are not material to this petition.

The conspiracy for which petitioners were convicted was alleged to have taken place between March 4 and March 12, 1971, prior to May 1, 1971, the effective date of repeal by Pub. L. 91-513 of 26 U.S.C. §§ 4705(a) and 7237(b) and (d), but the trial commenced with impanellment of a jury on May 3, 1971 and concluded with verdicts on May 6, 1971. Petitioners were thereafter sentenced on June 2, 1971.[2] A copy of one of the judgments of conviction and commitments, which is identical in all material respects with each of the other judgments, is appended hereto as Appendix C.

Following affirmance of the convictions on January 27, 1972, (see Appendix B) on February 7, 1972, petitioners filed in the district court, motions for correction of an illegal sentence under Rule 35. The district court took no action upon the motions and directed that pleadings be filed in the Court of Appeals.

Petitioners thereupon filed joint motions with the court of appeals respectively for order vacating sentences and for remand and for stay of mandate. Copies of the motions are appended hereto respectively as Appendices D and E.

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[2] The opinion of March 10, 1972, is incorrect insofar as it states that May 1, 1972 was "five days prior to sentencing". See Appendix A, p. 12.

The motion for vacation alleged that the sentences originally imposed by the district court were illegal in that the district court did not take into account "the provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, insofar as such Act provided the ... sentencing alternatives" of probation, suspension of sentence and parole, available as of May 1, 1971.

On March 10, 1972, the Court of Appeals entered the order previously referred to, denying petitioners' motion, from which order certiorari is sought, with the accompanying opinion affirming the sentences. The court reached "the merits of [petitioners'] motion by considering it as an appendage to this appeal". Slip opinion, at 2; Appendix A at 11.

Reasons For Granting the Writ

THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ON THE QUESTION OF WHETHER 26 U.S.C. 7237(d) CONTROLS SENTENCING IN SENTENCING PROCEEDINGS FOLLOWING ITS REPEAL ON MAY 1, 1971.

Besides repeal of 26 U.S.C. §4705(a) and 26 U.S.C. §7237(b) by §1103(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, 21 U.S.C. 176a, governing illegal importation of marihuana, to which, prior to May 1, 1971, 26 U.S.C. §7237(d) applied, was also repealed. The Court of Appeals for the Ninth Circuit held in *United States* v. *Stephens*, 449 F.2d 103, 105 (9 Cir., 1971), that while both §1103(a), the savings clause of P.L. 91-513, and 1 U.S.C. §109, the general savings clause, precluded "abatement of proceedings under §176a", neither savings statute rendered ineffective the repeal by P.L. 91-513 of 26 U.S.C. §7237(d).

The First Circuit, however, in the instant case held

"that narcotics offenses committed prior to May 1, 1971 are to be punished according to the law in force at the time of the offense. In the instant case, this conclusion requires the continuing application of §§7237(b) and (d)." *United States* v. *Bradley*, Slip Op., at 3-4, Appendix A at 13. The First Circuit expressly disagreed with the holding in *Stephens*, *id.*

As to the application of §1103(a) of P.L. 91-513, the First Circuit reasoned that sentence and "the manner of sentencing", (Appendix A at 14) are part of "prosecution" and that therefore §1103(a) maintained 26 U.S.C. §7237(d) in force, even though sentencing took place after May 1, 1971.

The Ninth Circuit. on the other hand, found "[t]he purpose of [§1103(a) to have been] served when judgment under the old Act has been entered and abatement of proceedings has been avoided. At that point litigation has ended and appeal is available. *Korematsu* v. *United States*, 319 U.S. 432 (1943)." *United States* v. *Stephens*, 449 F.2d 103, 105 (9 Cir., 1971)

With respect to 1 U.S.C. §109, while the Ninth Circuit reasoned that since "repeal of §7237(d) poses no threat to abatement" and "does not wipe clean the defendant's penal obligation, 1 U.S.C. §109 was not intended to keep the prohibition in 26 U.S.C. §7237(d) alive following repeal," (*id.*, at 106) the First Circuit did not find 1 U.S.C. §109 so limited. "It [§109] refers unambiguously to 'any statute', whether that statute defines a crime, prescribes a penalty, or elaborates on the nature of the penalty to be imposed." Appendix A, at 15.

Petitioners submit that the approach and holding of the *Stephens* case is consistent with the purposes of §1103(a) of P.L. 91-513, as well as with the purposes of 1 U.S.C. §109.

This Court in *Korematsu* v. *United States*, 319 U.S. 432, 435 (1943), upon which the Ninth Circuit relied in *United*

States v. *Stephens*, 449 F.2d 103, 105 (9 Cir., 1971), distinguished, conceptually as well as chronologically, between "litigation 'on the merits'" on the one hand and the chronologically later "institution of disciplinary measures", *Korematsu* v. *United States*, *supra*, at 435. Petitioners submit that the court in *Stephens* was correct in holding that the "prosecution", for the purposes of §1103(a), was synonymous with "litigation 'on the merits'" and that prosecution ends with termination of the litigation by a determination of guilt.

It seems clear, moreover, that a sentencing court has power, having sentenced, to suspend the sentence *thereafter* and to place the defendant on probation, under 18 U.S.C. §3651, so long as the defendant has not commenced execution of his sentence. *Affronti* v. *United States*, 350 U.S. 79, 82 (1955); *United States* v. *Murray*, 275 U.S. 347, 356-358 (1928); *United States* v. *Ellenbogen*, 390 F.2d 537, 541 (2 Cir., 1968). The prosecution will have ended, at the latest, with the imposition of sentence and would not be affected by the later order under 18 U.S.C. §3651. The distinction is maintained "between the conviction and certainty of punishment, on the one hand, and the public disgrace of incarceration and evil association, on the other." *United States* v. *Murray*, 275 U.S. 347, 357 (1928). The goals of "prosecution" have been met. "Prosecution for crimes is but an application or enforcement of the law . . ." (*United States* v. *Chambers*, 291 U.S. 217, 226 (1934)) and the law is no less applied or enforced because a sentence validly imposed is thereupon or thereafter suspended, or because a sentenced and imprisoned defendant is later paroled.

As to the application of 1 U.S.C. §109, the reasoning of the Ninth Circuit in *United States* v. *Stephens*, 449 F.2d 103, 105 (9 Cir., 1971), is persuasive. The right of the Government to prosecute under 21 U.S.C. §176a in that

case, and under 26 U.S.C. §4705(a) in this case, and the liability of the defendants in each case to prosecution for this conduct, prior to May 1, 1971, remained unabated by the repeal effected by §1101 of Pub. L. 91-513. 1 U.S.C. §109 has saved this right and this liability from "technical" abatement. See *Hamm* v. *City of Rock Hill*, 379 U.S. 306, 314 (1964). The penalty which might be incurred was defined in the *Stephens* case by 21 U.S.C. §176a and in the instant case by 26 U.S.C. §7237(b), as a minimum term of imprisonment of five years and a maximum of twenty years. Those penalties remain unchanged by §1101 of Pub. L. 91-513, by virtue of 1 U.S.C. §109. The repeal has not abated the imposition of discipline (see *Korematsu* v. *United States*, 319 U.S. 432, 434 (1943)) but merely reinstated the power of the respective courts to act under 18 U.S.C. §3651 to suspend these sentences upon or after their imposition and the power of the executive at a later time, if execution of a sentence of imprisonment is not suspended, to release upon parole under 18 U.S.C. §§4202 and 4203.

The existence of a conflict between the decisions of two courts of appeal as to matters having to do with suspension of sentence and probation has in the past justified the granting of certiorari by this Court. *Affronti* v. *United States*, 350 U.S. 79, 80 (1955). Here, it may be expected that the questions presented by this petition and by the conflict between courts of appeal herein recited may recur, not only as presented here, but in the context of petitions under 28 U.S.C. §2255 by federal prisoners (1) who contend that sentencing judges improperly restricted their sentencing discretion, or (2) who contend that they are illegally precluded from applying for release on parole under 18 U.S.C. §4202.

It is respectfully submitted that the conflict between the United States Court of Appeals for the First Circuit and

the United States Court of Appeals for the Ninth Circuit justifies the grant of certiorari to review the order and judgment below.

Conclusion

For the reasons above stated, a writ of certiorari should issue to review the order, judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

Nos. 71-1186, 71-1187,
71-1188, 71-1189.

UNITED STATES OF AMERICA,
APPELLEE,
v.
JAMES B. BRADLEY, JR.,
BYRON H. JOHNSON,
ROBERT T. ODELL, JR., and
WILLIAM JAMES HELLIESEN,
DEFENDANTS, APPELLANTS.

ON MOTION FOR ORDER VACATING SENTENCES AND ON REMAND

Before ALDRICH, *Chief Judge*,
BREITENSTEIN, *Senior Circuit Judge*,*
and MCENTEE, *Circuit Judge*.

March 10, 1972

MCENTEE, *Circuit Judge*. Following the affirmance of their convictions on appeal, *United States* v. *Bradley*, Nos. 71-1186-1189 (1st Cir. Jan. 27, 1972), the defendants jointly moved in this court for vacation of sentences pursuant to Rule 35, Fed.R.Crim.P. Although, as the government correctly contends, Rule 35 motions are properly directed in the first instance to the district court, we reach the merits of defendants' motion by considering it as an appendage to their appeal.

* Of the Tenth Circuit, sitting by designation.

Defendants allege that the district court sentenced them under the terms of a statute no longer in force. The chronology of relevant events can be simply stated. In March 1971 the four defendants conspired to violate 26 U.S.C. § 4705(a) by selling cocaine not in pursuance of a written order form, in violation of 26 U.S.C. §7237(b). A jury found them guilty of this offense on May 6, 1971, and the court sentenced each defendant to a five year term, the minimum punishment for first offenders under § 7237(b). Pursuant to § 7237(d), these sentences could not be suspended, nor could parole or probation be granted. On May 1, 1971, five days prior to sentencing, most of the existing federal narcotics laws, including §§ 4705(a), 7237(b) and 7237(d), were repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1242 *et seq.*, 21 U.S.C. §§ 801 *et seq.* The 1970 Act redefined the substantive offenses and generally liberalized the penalty provisions, in most instances no longer forbidding suspended sentences, parole, or probation. The defendants argue that since the 1970 Act was in force when they were sentenced, the court should not have felt constrained by § 7237(d), but should have considered the above sentencing alternatives. We disagree.

Whether a repealed provision remains in force as to pre-repeal activities is a matter of Congressional intent to be determined from statutory saving provisions. The general saving provision, 1 U.S.C. § 109, was originally enacted in 1871 in reaction to the common law holding in *United States v. Tynen*, 78 U.S. 88 (1871) that the repeal of a penalty provision totally abated the prosecutions of pre-repeal offenders. The statute provides, in pertinent part:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing

> Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

In *United States* v. *Reisinger*, 128 U.S. 398, 402 (1888), the Supreme Court held that the words "penalty," "forfeiture," and "liability" apply to criminal offenses *and the punishment therefor*.[1] Thus, unless the repealing statute explicitly provides otherwise, the repeal of a criminal statute neither abates the underlying offense nor affects its attendant penalties with respect to acts committed prior to repeal.[2]

F.2d 312, 315-18 (4th Cir.), *cert. denied*, 338 U.S. 834 (1949).

We find no express, or even implied, indication in the 1970 Act that Congress intended that prior offenders not be sentenced under the pre-existing penalty provisions. To the contrary, § 1103(a), the specific saving provision of Pub. L. 91-513, states:

> "Prosecutions for any violation of law occurring prior to the effective date of section 1101 shall not be affected by the repeals or amendments made by such section or section 1102, or abated by reason thereof."

Reading this section of the 1970 Act against the background of § 109, we hold that narcotics offenses committed prior to May 1, 1971, are to be punished according to the law in force at the time of the offense. In the instant case, this conclusion requires the continuing application of §§ 7327(b) and (d).

---

[1] See also the elaborate discussion in *United States* v. *Lovely*, 175

[2] *See Moorehead* v. *Hunter*, 198 F.2d 52 (10th Cir. 1952). For other instances where enforcement proceedings survived a statute's repeal due to the general saving provision, *see, e.g., Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535 (1954); *De La Rama Steamship Co.* v. *United States*, 344 U.S. 386 (1953); *United States* v. *Carter*, 171 F.2d 530 (5th Cir. 1948).

The defendants rely on the recent case of *United States* v. *Stephens*, 449 F.2d 103 (9th Cir. 1971), which involved a similar chronological sequence but reached the opposite conclusion with respect to § 7237(d). In *Stephens* the defendants were prosecuted and convicted for violations of 21 U.S.C. § 176(a)[3] and on May 24, 1971, received five year sentences, the minimum prescribed by § 176(a). These sentences, however, were then suspended and each defendant was placed on probation for five years. The Ninth Circuit, denying mandamus against the trial judge, held that the suspension of sentence and the grant of probation were authorized by the terms of the 1970 Act. The court concluded, after examining the specific and general statutory saving provisions, that neither preserved § 7237(d).

With respect to § 1103(a) of Pub. L. 91-513, relying on *Korematsu* v. *United States*, 319 U.S. 432 (1943), the Ninth Circuit held that "prosecutions" end with the determination of guilt and that the manner of sentencing in no way affects the prosecution of a case. *Korematsu* leads us to precisely the opposite conclusion. That case involved the finality, for purposes of appeal, of an order placing a defendant on probation after his conviction without first having formally sentenced him. The Court, citing *Berman* v. *United States*, 302 U.S. 211 (1937), held that the order was final since it "terminate[d] the litigation . . . on the merits" and [*left*] *nothing to be done but to enforce by execution what ha*[*d*] *been determined*" (emphasis added). In *Korematsu* there was both a determination of guilt and imposition of disciplinary measures; no further court order was anticipated. In both *Stephens* and the instant case, until the sentences had been determined the proceedings had not reached a comparable state of finality. Where sentence is imposed as noted in *Berman* v. *United States*, *supra* at 212, "[f]inal judgment in a criminal case means sentence. The sentence is the judgment." We cannot agree, therefore, even reading

[3] 21 U.S.C. § 176(a) was repealed by the 1970 Act.

§ 1103(a) *in vacuo,* that "prosecution" excludes and is unaffected by sentencing. Our conclusion is strengthened when § 1103(a) is read against the background of § 109, which specifically mentions penalties and liabilities and which requires *express* statutory provisions to counteract its saving effect.

The court in *Stephens,* however, did not read the two sections together because it held that § 109 was inapplicable to the repeal of §7237(d). Noting that § 109 was designed to obviate "mere technical abatement," the court concluded it did not apply to a provision like § 7237(d), the repeal of which did not threaten abatement of a substantive prosecution. We do not agree that § 109 is limited to those statutes the repeal of which, at common law, would have abated a cause of action or prosecution.[4] Although designed to avoid technical abatement, the statute is not limited to that situation. It refers unambiguously to "any statute," whether that statute defines a crime, prescribes a penalty, or elaborates on the nature of the penalty to be imposed. Section 7237(d) was part of the "liability incurred" by violation of § 7237(b). That is, had trial and sentencing been simultaneous with the offense, the defendants herein clearly would have been ineligible for suspended sentences, parole, or probation. Regardless of whether the legislative grant or these sentencing alternatives is viewed as a release of penalty,[5] under the mandate of § 109 the repealed statute, § 7237(d) is "to be treated as still remaining in force."

The sentences having been legally imposed, they are hereby affirmed.[6]

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[4] Nor do we find it so clear, as did the Ninth Circuit, that the repeal of § 7237(d) would not have abated prosecutions at common law.

[5] In an independent argument on the inapplicability of § 109 to the repeal of § 7237(d), the *Stephens* court contends that the grant of probation neither extinguishes nor releases a penal obligation.

[6] Since sending this case to the printer our attention has been called to a similar holding in *United States* v. *Fiotto, et al,* 2 Cir., 1/4/72.

APPENDIX A-1

United States Court of Appeals
For the First Circuit

No. 71-1186.

UNITED STATES OF AMERICA,
APPELLEE,
v.
BYRON H. JOHNSON,
DEFENDANT, APPELLANT.

No. 71-1187.

UNITED STATES OF AMERICA,
APPELLEE,
v.
WILLIAM HELLIESEN,
DEFENDANT, APPELLANT.

No. 71-1188.

UNITED STATES OF AMERICA,
APPELLEE,
v.
CHARLES B. BRADLEY, JR.,
DEFENDANT, APPELLANT.

No. 71-1189.

UNITED STATES OF AMERICA,
APPELLEE,
v.
ROBERT T. ODELL, JR.,
DEFENDANT, APPELLANT.

ORDER OF COURT

Entered March 10, 1972

In accordance with the opinion filed herein today,

It is ordered that the appellants' motion for order vacating sentences and for remand and appellants' motion for stay of mandate pending resentencing be, and they hereby are, denied.

By the Court:

(s) DANA H. GALLUP

Clerk.

APPENDIX B

United States Court of Appeals
For the First Circuit

Nos. 71-1186, 71-1187,
71-1188, 71-1189.

UNITED STATES OF AMERICA,
APPELLEE,

v.

JAMES B. BRADLEY, JR.,
BYRON H. JOHNSON,
ROBERT T. ODELL, JR., and
WILLIAM JAMES HELLIESEN,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
BREITENSTEIN, *Senior Circuit Judge*,*
and MCENTEE, *Circuit Judge*.

January 27, 1972

MCENTEE, *Circuit Judge*. This is the consolidated appeal of four defendants, Bradley, Johnson, Odell, and Helliesen, who were tried together before a jury on a six-count indictment. All were found guilty of conspiracy to sell a narcotic drug not in pursuance of a written order[1] (Count 1). All

* Of the Tenth Circuit, sitting by designation.

[1] In violation of 26 U.S.C. § 7237(b). Repealed Pub. L. 91-513, § 1101(b) (4) (A), October 27, 1970, 84 Stat. 1292, effective date of repeal being May 1, 1971, Pub. L. 91-513, § 1105(a). Defend-

but defendant Johnson were charged with and convicted of carrying firearms during the commission of a felony[2] (Counts 4, 5, and 6). Defendants Johnson and Bradley were also charged with selling cocaine[3] (Counts 2 and 3), but the jury acquitted them on those two counts. The defendants urge reversal of their convictions on a number of grounds, generally attacking the legality of arrests and searches, the sufficiency of the government's evidence, and the conspiracy instructions given by the trial judge.

The case involves a proposed narcotics transaction between the defendants and federal undercover narcotics agents. The agents, through an informer named Arthur Motsis,[4] contacted defendant Bradley, who said he could arrange for the sale to them of one and a half pounds of cocaine. Preparations for this transaction began on March 4, 1971, and continued until March 12. On that day, at approximately 9:29 p.m., Motsis and Agents Egan and Ross went to the first floor apartment at 73 Magazine Street, Cambridge, Massachusetts. Bradley apparently alone in apartment, admitted them,[5] and five minutes later these four went outside to the agents' car to count the money. Bradley stated that the price was $9,500, which was $500 more than the agents had with them. The agents and Motsis then left to get the extra money, and returned at approximately 11:05 p.m.

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anta each were sentenced to five year prison terms, the minimum sentence under 26 U.S.C. § 7237(b).

[2] In violation of 18 U.S.C. § 924(c) (2). Each received a one year suspended sentence and was placed on probation for three years, to be served on and after the five year sentence.

[3] In violation of 26 U.S.C. § 4705(a). Repealed Pub. L. 91-513, § 1101(b) (3) (A), October 27, 1970, 84 Stat. 1292; effective date of repeal being May 1, 1971, Pub. L. 91-513 § 1105(a).

[4] Motsis was named in Count 1 as a co-conspirator but not as a defendant.

[5] It was necessary to go through three doors to enter the apartment. The outer door to the building was closed but unlocked. Next was the foyer door, which operated on a buzzer lock system. In a direct line with these two doors was the door to the apartment itself.

Upon their return, the agents and the informer were admitted by defendant Odell, and within the next few minutes all the defendants were present in the apartment. In the course of conversation, Bradley admitted that he had a gun. Defendant Johnson produced a sample of the cocaine in a tinfoil packet, which was placed on a scale by Agent Egan. Each of the defendants sampled a bit of the cocaine, which remained on the scale after this sampling. Several minutes later, defendants Johnson, Helliesen, and Bradley left the apartment. Johnson and Helliessen were to get the main supply of cocaine from their car; Bradley apparently just drifted out to the courtyard of the apartment building. Agent Egan and informer Motsis left to get the money from the government vehicle; Agent Ross remained in the apartment with Odell.

After a quick drive around the block to check the area, Johnson and Helliesen exited from their car and started toward the apartment. Johnson was carrying a flight bag later determined to contain sixteen plastic bags of cocaine. Motsis remained in the government car, and Egan followed Johnson and Helliesen from the street to the apartment building. A ten-man government surveillance team was in the immediate vicinity.

It is at this point, the time of re-entry into the apartment building at 11:35, that the evidence adduced at the pre-trial hearing on defendants' motion to suppress becomes contradictory. Agent Egan testified that Johnson and Helliesen preceded him through the unlocked outer door, at which time Odell opened the apartment door and saw them standing there. Odell buzzed open the foyer door, and Johnson, Helliesen and Egan entered. Egan stated that when the foyer door was opened, Agent Maloney was a few steps behind him, followed by the rest of the surveillance team. Agent Ross, who was inside the apartment with Odell discussing the pending sale, testified that Odell opened the

apartment door, looked out, and then buzzed open the foyer door. Helliesen and Johnson entered, followed by Egan and then the surveillance team. Johnson, Helliesen, and Odell were arrested immediately. A third agent testified that he peaceably arrested Bradley on the steps outside the apartment building after Egan had passed through the foyer door. Bradley, however, testified that Helliesen and Johnson were totally inside the apartment when Egan and the other agents ran up to the apartment building, grabbed Bradley, opened the unlocked outer door, and then shoved Bradley against the foyer door, causing the lock to break and spring open. Bradley did not recall how the apartment door was opened. Odell testified that while in the apartment with Johnson and Helliesen he heard a loud bang from the direction of the foyer door, and seconds later the apartment door was opened from the outside and about ten agents streamed in.

Based on this evidence the court found that the entry was not by force, Odell having voluntarily buzzed open the foyer door and opened the apartment door. The trial judge further found that any delay in order to obtain a warrant or any announcement of authority and purpose would likely have permitted the destruction of evidence. It therefore ruled that the arrests were legal and denied the motions to suppress.[6]

Defendants challenge the legality of the arrests on several grounds, the first being that they violated 18 U.S.C. § 3109.[7]

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[6] The defendants sought to suppress the cocaine found in the flight bag and the sample of cocaine found on the scales in the apartment, as well as the firearms found incident to arrest.

[7] 18 U.S.C. § 3109 provides:

"The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

This statute is applicable to the entry of federal officers, *Sabbath* v. *United States*, 391 U.S. 585, 588-89 (1968),[8] and its standards apply to entry to execute a warrantless arrest, *Miller* v. *United States*, 357 U.S. 301, 306 (1958). Defendants' contention that the agents employed force to enter at 11:35 is without merit, since the finding of no force by the trial court, which was far from "clearly erroneous," is binding on this court. Nor was the court obligated to reverse its ruling or reopen the hearing when evidence adduced at the trial allegedly contradicted the pre-trial evidence.[9] The court did not refuse to consider the evidence, *cf. Rouse* v. *United States*, 359 F. 2d 1014 (D.C. Cir. 1966), but reasonably believed that it did not compel a different finding.[10] There was no abuse of discretion in not conducting a further hearing on the matter.

Defendants contend that, notwithstanding the absence of force, 18 U.S.C. § 3109 was violated by use of a ruse.[11]

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[8] This court's decision in *Jackson* v. *United States*, 354 F. 2d 980 (1st Cir. 1965) is not to the contrary. In that case the entry was made simultaneously by both state and federal officials. State law governs the arrest by state officials for federal offenses, *Ker* v. *California*, 374 U.S. 23 (1963), but where only federal officials are involved, federal law is controlling, *Sabbath*, *supra*.

[9] Agent Lambert, a member of the surveillance team, testified that he watched the 11:35 entry from approximately seventy-five yards away with the aid of field glasses. Lambert saw Johnson, Hellieson, and Egan approaching the apartment building, and then his vision was obstructed. The next time Lambert saw Egan, the latter was about to enter the outer door, and Johnson and Hellieson were not in sight. The defendants contend this is consistent with the pre-trial testimony of Bradley and Odell that Johnson and Hellieson entered the apartment a considerable time before Egan entered. It is not, however, inconsistent with the agents' testimony that Johnson and Hellieson merely preceded Egan through the outer door.

[10] "The Court: I agree there is additional testimony but it does not change my view of the ultimate facts."

[11] The ruse is alleged to have occurred at 11:35 when Egan entered the apartment as an undercover agent *for the purpose of arrest*. The defendants argue that the agent's purpose sufficiently distinguishes the situation from *Lewis* v. *United States*, 385 U.S. 206 (1966), where the undercover agent entered for the very purposes contemplated by the occupant.

While a physical breaking is not required for a § 3109 violation, *Sabbath* v. *United States, supra*, the Supreme Court has expressly reserved the question of a ruse. *Id.* at 590, n. 7. Since *Sabbath*, the lower federal courts have spoken variously on the question,[12] and this court has not yet passed on it. While the matter is of substantial importance, we do not reach the question in this case due to the prior lawful entry of Agent Ross.[13]

When Agent Egan and the surveillance team entered at 11:35 on March 12, Agent Ross was already inside the apartment. His entry at 11:05 with Egan was clearly lawful. As in *Lewis* v. *United States, supra* note 11, the agents were invited into the apartment for the purpose of executing a felonious sale of narcotics, and the defendants' only concern was that the agents were willing purchasers, which they were. Following the lawful entry, Agent Ross remained in the apartment. The defendants do not allege, nor could they, that Ross' presence suddenly became unlawful or that their privacy suddenly was invaded solely because his role changed from undercover agent to arresting officer. To so hold, as was stated in *Lewis* v. *United States, supra* at 210, would "come near to a rule that the use of undercover agents in any manner is virtually unconstitutional *per se*."

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[12] For post-*Sabbath* decisions on the issue, *see, e.g.*, *United States* v. *Beale*, 445 F. 2d 977 (5th Cir. 1971) (ruse does not violate § 3109) (but see Tuttle, J., dissenting); *United States* v. *Harris*, 435 F. 2d 74 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 986 (1971) (ruse violates § 3109); *United States* v. *Syler*, 430 F. 2d 68 (7th Cir. 1970) (ruse does not violate § 3109); *Ponce* v. *Craven*, 409 F. 2d 621 (9th Cir. 1969), *cert. denied*, 397 U.S. 1012 (1970) (ruse does not violate analogous state statute); *Bowers* v. *Coiner*, 309 F. Supp. 1064 (S.D. W.Va. 1970) (ruse violates § 3109); *United States* v. *Burruss*, 306 F. Supp. 915 (E.D. Pa. 1969) (implies but does not decide that ruse violates § 3109).

[13] Nor need we reach the questions of whether the action of the federal agents constitutes a ruse, *see* note 11 *supra*, or whether exigent circumstances warrant an exception to § 3109, *see generally* *Sabbath* v. *United States*, *supra* at 591 n. 8; *Ker* v. *California*, *supra* note 8; *Johnson* v. *United States*, 333 U.S. 10 (1948).

The lawful presence of a government agent precludes any argument that later entries violate the privacy of occupants. Since privacy is what § 3109 seeks to protect, the prior lawful entry and continued presence of Agent Ross vitiates any impropriety of subsequent entries. *See United States* v. *Marson*, 408 F. 2d 644 (4th Cir. 1968), *cert. denied*, 393 U.S. 1056 (1969); *Cognetta* v. *United States*, 313 F. 2d 870 (9th Cir. 1963); *United States* v. *Viale*, 312 F. 2d 595 (2d Cir.), *cert. denied*, 373 U.S. 903 (1963).

The defendants raise several objections to the searches apart from the alleged violation of § 3109. In that probable cause existed to arrest Johnson and Hellieson as they approached the apartment building, defendants argue that those arrests were unlawfully delayed to afford an opportunity to search the premises incident to arrest. However, any interior search incident to arrest could have been carried out with regard to Odell; and nothing was seized as a result of the delay which would not have been seized had Johnson and Helliesen been arrested outside. As we stated in *United States* v. *Berkowitz*, 429 F. 2d 921, 926 (1st Cir. 1970), "[w]e are unaware of any right of a defendant to be arrested at a particular time." There is absolutely no indication that the primary purpose of any momentary delay was to allow a search inside the apartment.[14] *Cf. McKnight* v. *United States*, 183 F. 2d 977 (D.C. Cir. 1950).

Defendants also claim that the search and seizure of the flight bag containing cocaine violated the doctrine of *Chimel* v. *California*, 395 U.S. 752 (1969).[15] Agent Egan testified

[14] Government evidence established that the arrests were made inside pursuant to a pre-arranged plan to keep potential gun play at a minimum.

[15] In *Chimel* police officers arrested the petitioner in his home and incident to that arrest searched his entire three-bedroom house, including attic, garage, and workshop, and caused his bureau drawers to be opened and searched. Condemning this search as unreasonable under the fourth amendment, the Court held that the scope of a search incident to arrest should be limited to the person and the area from which he could obtain a weapon or inculpatory evidence.

that as Johnson was being placed under arrest in one room of the apartment, he threw the flight bag into the next room. The bag was within Johnson's control at the instant of arrest, and remained in plain view thereafter, thus giving rise to a *duty* to seize it. *United States* v. *Palmer*, 435 F. 2d 653, 655 (1st Cir. 1970). *Chimel* prohibited general exploratory searches incident to arrest but did not erect impenetrable barriers at every doorway.

The final search and seizure claim, that entry without warrant was unjustified, is also without merit. Prior to the 11:05 meeting, the agents knew the identity of only one of the conspirators and did not know where the cocaine was located. In fact, the 11:05 meeting was not definitely arranged until about 10:35 that evening. The surveillance team was positioned in the area apparently on the hunch that the transaction would be completed there. This situation does not approach that of *Niro* v. *United States*, 388 F. 2d 535 (1st Cir. 1968), where the agents could have affected the arrests twelve hours before they did so and inexcusably neglected to obtain warrants during the interim. Once the transaction herein started to unfold, it was obvious that delay in order to obtain warrants would have permitted the destruction of evidence and the escape of suspects, and might have increased the level of potential danger. Such exigencies override the general requirement of a warrant. *See, e.g., Ker* v. *California*, *supra* note 8; *Dorman* v. *United States*, 435 F. 2d 385 (D.C. Cir. 1970) (*en banc*).

With regard to the conspiracy convictions, the defendants challenge both the sufficiency of the evidence and the jury instructions on the issue of intent. Count 1 of the indictment charged a conspiracy to violate 26 U.S.C. § 4705(a), selling a narcotic drug not in pursuance of a written treasury order form.[20] Defendants argue that proof of their knowl-

[20] 26 U.S.C. § 4705(a) provides:

"(a) *General requirement.*—It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs

edge of and intent not to obtain the Treasury forms is requisite to a conviction for conspiracy.

While it is of course true that conviction of a conspiracy to transfer narcotics in violation of 26 U.S.C. § 4705(a), unlike the substantive offense, may not be sustained without proof of specific intent,[17] the defendants are incorrect in asserting that actual knowledge of the order form requirement was an essential element of the government's case. The essence of the jury's task in deciding here whether the defendants were guilty of participation in an illegal conspiracy involved determining, first, whether the object of the conspiracy constituted a substantive offense; second, whether in agreeing to work in concert the defendants knew or should have known that the specific object of the agreement was unlawful; and, third, whether one or more of the defendants acted in furtherance of the agreement. *See, e.g., United States* v. *Falcone*, 311 U.S. 205, 210 (1940). To find the requisite *mens rea*, the jury need not have found that the defendants actually knew that the statute did not penalize narcotics transferred pursuant to a treasury form issued for that purpose but need only have found beyond a reasonable doubt that the defendants thought that what they had

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except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

[17] The Supreme Court, construing the part of § 2 of the Harrison Narcotic Act of 1914, on which 26 U.S.C. § 4705(a) is based, held that the substantive offense did not require a showing of specific intent. *United States* v. *Balint*, 258 U.S. 250 (1922). This decision has been cited with approval since the passage of § 4705 (a), *United States* v. *Wiesenfeld Warehouse Co.*, 376 U.S. 86 (1964), and has been specifically applied to that section, *United States* v. *Jones*, 438 F. 2d 461, 466 (7th Cir. 1971). This court's discussion in *United States* v. *Goldman*, No. 71-1042 (1st Cir., Nov. 9, 1971) of a defense of lack of knowledge that pills were narcotic is not to be read as contrary to the proposition that no specific intent is required under 26 U.S.C. § 4705(a).

agreed to do was illegal and that it was illegal in fact.[18] *Cf. Nelson* v. *United States*, 415 F. 2d 482, 486-87 (5th Cir. 1969), *cert. denied*, 396 U.S. 1060 (1970); *Nassif* v. *United States*, 370 F. 2d 147, 151-53 (1966); *Hanis* v. *United States*, 246 F. 2d 781, 786-88 (8th Cir. 1957). The court's general instructions to the jury were adequate on this point and the court properly refused the alternative submitted by the defendants.[19]

As to defendants' charge that the government's evidence was insufficient to establish that they had conspired with a specific intent to transfer narcotic drugs illegally, there was abundant evidence—to which the jury apparently attached conclusive weight—that the events leading up to the final sale and the transfer of the "sample" cocaine took place

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[18] As we noted in our recent opinion in *United States* v. *Medina*, —— F. 2d —— (1st Cir. 1971), the federal narcotics statute explicitly relieves the government of any responsibility for proving as part of its case-in-chief that a sale of narcotics, had it been completed, would not have been accompanied by an order form. 26 U.S.C. § 4724(c). Whether use of an order form is contemplated is a fact peculiarly within the knowledge of the accused and is available as an affirmative defense. *Cf. United States* v. *Fleischman*, 339 U.S. 349, 359-64 (1950). The fact that in response to the government's claim of an illegal intent defendants would have had to show that they intended to use an order form should not mean that the government's own proof need be that specific.

[19] Defendants' jointly submitted instructions Nos. 8 and 9 were:

"8. Likewise, with respect to Count 1, you may not find the specific intent necessary to convict a defendant under Count 1, unless you find beyond a reasonable doubt that it was an object of the conspiracy in which a defendant may be found to have participated that a narcotic drug would be sold, bartered, exchanged or given away not in pursuance of a written order of the person to whom such narcotic was to be sold, bartered, exchanged or given away on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate, and that knowing of the requirement of such written order, such defendant participated in the alleged conspiracy with the intent that such form not be obtained.

"9. The specific intent necessary for a guilty verdict is the awareness by the defendant or the existence of all those facts which make his conduct criminal. *United States* v. *Crimmins*, 123 F. 2d 271 (2 Cir., 1941)."

under the most clandestine of circumstances. The defendants took great care to assure themselves that they were not dealing with federal agents and numerous statements by the defendants indicated knowledge on their part that the contemplated sale was illegal. The jury was entitled to infer from this circumstantial evidence that the defendants specifically intended with full knowledge of illegality to transfer narcotics in violation of 26 U.S.C. § 4705(a). *United States* v. *Vasquez*, 429 F. 2d 615 (1970). *See also Ingram* v. *United States*, 360 U.S. 672, 679 (1959); *Screws* v. *United States*, 325 U.S. 91, 106 (1945); *Direct Sales Co.* v. *United States*, 319 U.S. 703 (1943); *In re Coy*, 127 U.S. 731, 753 (1888); *Developments in the Law, Criminal Conspiracy*, 72 Harv. L. Rev. 920, 936-40 (1959).

Defendants' final contention is that the court's failure to give a requested conspiracy instruction was reversible error. The requested charge arguably combines the elements of individual participation and proof of a conspiracy independent of hearsay statements.[20] The district court did give correct instructions on each of these aspects of conspiracy. It stated that to be a conspirator "one must knowingly participate in the conspiracy intending to further its purposes," and described at length how one might be such a participant. With respect to the independent proof of the conspiracy, until a *prima facie* case of conspiracy was established the court limited all hearsay statements to the one who made them. Once a *prima facie* case was presented, the court gave more extensive instructions on the need for proof

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[20] Defendants' requested instruction was as follows:

"3. The existence of a conspiracy cannot be established as against an alleged conspirator by evidence of the actions and declarations of his alleged co-conspirators, made in his absence. Such acts and declarations are admissible against him only when there is other proof of his connection with a conspiracy. *Glasser* v. *United States*, 315 U.S. 60, 75 (1942); *Perina* v. *United States*, 308 F. 2d 98, 104-105 (8 Cir., 1962)."

of the conspiracy independent of hearsay declarations.[21] Especially in view of the substantial independent evidence of the conspiracy, it was not reversible error not to repeat this instruction in the final charge to the jury.

Affirmed.

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[21] The Court:

"Now if you do by the evidence already here or hereafter submitted conclude that there was in fact such a conspiracy then the statements of any one of the co-conspirators are admissible against the other co-conspirators but you must determine by independent evidence, not by the statements themselves, as to whether there is a conspiracy."

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

Cr. No. 71-147-W

UNITED STATES OF AMERICA

v.

CHARLES B. BRADLEY, JR.

On this 2nd day of June, 1971 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant upon his pleas of not guilty as to counts 1, 3, and 4, and verdicts of guilty as to counts 1, 4, and not guilty as to count 3, has been convicted of the offenses of violations of Title 26, U.S.C., Section 7237(b) in that he did wilfully conspire with other persons to commit an offense against the United States, that is, to sell a narcotic drug (cocaine) not in pursuance of a written order on a form issued in blank by the Secretary of the Treasury; and Title 18, U.S.C., Section 924 (c)(2) in that he did wilfully, knowingly and unlawfully carry a firearm during the commission of a felony which may be prosecuted in a court of the United States,

as charged in an Indictment

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized

representative for imprisonment for a period of five (5) years on count 1. The Court directs that defendant be given credit for the six (6) days he has already spent in custody from March 12, 1971 through March 17, 1971.

And on count 4, defendant be imprisoned for a period of one (1) year, said prison sentence to be served on and after the sentence imposed on count 1; said prison sentence is suspended, and defendant is placed on probation for a period of three (3) years.

IT IS ADJUDGED that both sentences are stayed pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the Deputy United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(s) C. WYZANSKI
United States District Judge.

(s) RUSSELL H. PECK
Clerk.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Nos. 71-1186, 71-1187,
71-1188, 71-1189.

UNITED STATES OF AMERICA,
APPELLEE,
v.
CHARLES B. BRADLEY, JR.,
BYRON H. JOHNSON,
ROBERT T. ODELL, JR., and
WILLIAM JAMES HELLIESEN,
DEFENDANTS, APPELLANTS.

DEFENDANTS', APPELLANTS' MOTION FOR ORDER VACATING SENTENCES AND FOR REMAND

Defendants, Appellants move that the sentences herein be vacated and that the cases be remanded to the District Court for resentencing pursuant to Rule 35, Federal Rules of Criminal Procedure.

The grounds of this motion are as follows:

1. Each defendant, appellant was found guilty on May 6, 1971, of violation of 26 U.S.C., § 7237(b) and thereafter adjudged to be guilty as charged and convicted and further it was adjudged that each defendant, appellant be committed to the custody of the Attorney General for a period of five years pursuant to the conditions of 26 U.S.C., §7237(b) and (d);

2. Under the provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, certain sentencing alternatives, including probation, suspension of sentence and parole became effective as of May 1, 1971;

3. The District Court imposed illegal sentences upon defendants, appellants in that said Court did not take into account in sentencing defendants, appellants the provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, insofar as such Act provided the aforesaid sentencing alternatives;

4. Defendants, appellants state that this motion is made in good faith in that the holding of *United States* v. *Stephens*, 449 F.2d 103 (9 Cir., 1971), holds that the sentencing alternatives in P.L. 91-513 are available to defendants sentenced following May 1, 1971, even though convicted of offenses carrying mandatory minimum sentences prior to May 1, 1971.

By their attorneys,

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APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Nos. 71-1186, 71-1187,
71-1188, 71-1189.

UNITED STATES OF AMERICA,
APPELLEE,
v.
CHARLES B. BRADLEY, JR.,
BYRON H. JOHNSON,
ROBERT T. ODELL, JR., and
WILLIAM JAMES HELLIESEN,
DEFENDANTS, APPELLANTS.

DEFENDANTS', APPELLANTS' MOTION FOR STAY OF MANDATE

Defendants, appellants move that the mandate of this Court be stayed until such time as defendants, appellants shall have been resentenced by the District Court in accordance with defendants, appellants motion for order vacating sentences and for remand filed herewith.

By their attorneys,

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